



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

JUL - 9 2003



Mr. Tod N. Rockerfeller
319 Sunnyview St.
Carlsbad, NM 88220

Re: Petition for Withdrawal of New Mexico's Hazardous Waste Program, April 18, 2001
Docket Number NM/RCRA-2003-0001

Dear Mr. Rockerfeller:

Please find enclosed the Regional Administrator's Determination in regard to the above-referenced Petition. In accordance with 40 CFR Section 271.23(b), this is EPA's written response after an informal investigation of the allegations in your Petition.

While EPA appreciates the fact that you have many concerns about the Waste Isolation Pilot Plant, the Regional Administrator has determined that sufficient cause does not exist to commence withdrawal proceedings under the above referenced provision, and therefore your Petition has been denied. Please see the enclosed Determination for a detailed explanation.

If you have further questions about this Determination, please contact me at (214) 665-8179 or the attorney assigned to this matter, Bruce Jones, at (214) 665-3184.

Sincerely,

Stephen A. Gilrein, P.E.
Associate Director - RCRA

Enclosure

cc: Sandra Martin, NMED
Brian Grant, OGC
Dana Tulis, OSWER
Betsy Devlin, OECA

030710



Sandra Martin, Chief ✓
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REGIONAL HEARING CLERK
EPA REGION VI

Determination as to Whether Cause Exists to Withdraw the New Mexico RCRA Program

RESPONSE TO THE PETITIONER

June 3, 2003

This is the Determination as to whether cause exists for United States Environmental Protection Agency Region 6 ("Region") to commence proceedings for withdrawal of the New Mexico Environmental Department ("NMED") as the Resource Conservation and Recovery Act ("RCRA") authority for the State of New Mexico (40 CFR Parts 271.22 and 271.23) as requested by Tod N. Rockefeller, Petitioner.

Background

On April 18, 2001, Tod N. Rockefeller, "Petitioner," submitted a "Notification of Noncompliance & Petition for a Public Hearing for Withdrawal of the New Mexico Authorized State Hazardous Waste Program" (hereinafter the "Petition") administered by the State of New Mexico Environment Department ("NMED") to the EPA Administrator.

On June 6, 2001, the Petition was referred to EPA Region 6 for action since the Regional Administrator has been delegated the authority to take action relative to the authorization of New Mexico for implementation of the Resource Conservation and Recovery Act ("RCRA.") On July 19, 2001, the Region sent a letter to the Petitioner acknowledging receipt of the Petition, requesting that the Petitioner forward any additional information he might have to Region 6, and stating the Region was beginning an informal investigation into the Petition.

The Region began its informal investigation into the RCRA Petition pursuant to 40 CFR §§ 271.22 and 271.23. On July 12, 2001, the Region forwarded a copy of the Petition to NMED stating that the Region was beginning an informal review of the Petition and requesting that NMED forward to the Region any response or information NMED might have concerning the Petition. The Region received a response from NMED on April 10, 2002. The Region received no additional information from the Petitioner.

Many of the Petitioner's allegations, if not all of them, have been raised in several different forums. It appears from the Exhibits attached to the Petition that the Petitioner was employed by DOE -Waste Isolation Pilot Plant (WIPP), at some time, and that many of the health and safety issues cited in his Petition were also raised in the course of his employment at WIPP. In addition, many of the allegations were raised and resolved in a WIPP permitting action issued by NMED first as public comments and then in both an administrative appeal and state judicial appeals court action related to the WIPP permit. Since EPA (both the Region and EPA headquarters offices) have WIPP permitting oversight responsibilities, the relevant offices were contacted and asked to submit any pertinent documents that would be helpful in making this Determination on the Petition.

Summary of Petitioner's Allegations for Withdrawal of the RCRA Program

In preparing this Determination in response to the Petition, the Region has based its review on the provisions of 40 CFR §§271.22 and 271.23 which establish the parameters for withdrawal of an entire authorized state RCRA program. The Petition focuses primarily on how the NMED has implemented the authorized hazardous waste program at the Waste Isolation Pilot Plant (WIPP). The WIPP is the Nation's only nuclear repository for defense-related, transuranic waste and is operated by the Department of Energy (DOE). Radioactive waste containing hazardous waste

components were created during the Cold War and will be generated as the nuclear weapons stockpile is dismantled. The WIPP is a series of vaults mined into a saltbed 2150 feet underground. Waste is transported from generator sites and permanently disposed in these underground vaults.

The Petitioner's allegations, which form the basis for his Petition, are summarized below. All of the allegations are related to activities at the WIPP facility or NMED's actions in issuing an operating permit to DOE for the WIPP facility.

The Petitioner alleges:

1. that a State Hearing Officer made false representations as to Petitioner's testimony concerning the WIPP permit (Paragraphs 16-18, Petition),
2. that the State tried to "extort" money from the Petitioner by requesting that he pay for a copy of the permit appeal record (Paragraphs 19-26, Petition),
3. evidence tampering by the New Mexico State Appeals Court because it excluded certain material/evidence the Petitioner sought to have included in the record (Paragraphs 27-30, Petition),
4. criminal collusion and conspiracy between NMED, DOE and the State Appeals Court in excluding the evidence referenced in the evidence tampering charge and in the dismissal of his permit appeal (Paragraphs 31-33, Petition),
5. inadequate compression of O-rings of nuclear waste shipping casks resulting in an imminent hazard (Paragraph 34, Petition),
6. a cover-up by DOE of radionuclide liquid effluent monitoring errors at WIPP (Paragraph 35, Petition),
7. faulty radionuclide air monitoring at WIPP (Paragraph 36, Petition),
8. inadequate fire prevention controls underground at WIPP (Paragraph 37, Petition), and
9. other unspecified serious safety deficiencies at WIPP Paragraph 39-42, Petition.

The Petition also contained numerous Exhibits purporting to be evidence of the above listed allegations.

*Framework for Review of a Petition to Withdraw Approval
of an Authorized State Program*

Congress established in RCRA provisions for promulgating regulations to effectuate state program development, for authorizing state programs, and for withdrawing state program approval. RCRA Section 3006(a), (b) and (e), respectively.

Pursuant to RCRA 3006(a), EPA promulgated 40 CFR part 271. Particularly relevant to reviewing this Petition is 40 CFR 271.23(b)(1) which provides:

The Administrator shall respond in writing to any Petition to commence withdrawal proceedings. He may conduct an informal investigation of the allegations in the Petition to determine whether cause exists to commence proceedings under this paragraph (271.23(b)). (Emphasis added.)

The Region has conducted an informal investigation of the allegations of the Petitioner regarding NMED's authorized RCRA program to determine whether cause exists to commence withdrawal proceedings as a threshold matter. In order to make this Determination, EPA looked to the provisions of 40 CFR §271.22 which specify circumstances under which withdrawal may be appropriate:

(a) The Administrator may withdraw program approval when a State program no longer complies with the requirements of this subpart, and the State fails to take corrective action. Such circumstances include the following:

(1) When the State's legal authority no longer meets the requirements of this part including:

- (i) Failure of the State to promulgate or enact new authorities when necessary; or*
- (ii) Action by a State legislature or court striking down or limiting State authorities.*

(2) When the operation of the State program fails to comply with the requirements of this part, including:

- (i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;*
- (ii) Repeated issuance of permits which do not conform to the requirements of this part; or*
- (iii) Failure to comply with the public participation requirements of this part.*

(3) When the State's enforcement program fails to comply with the requirements of this part, including:

- (i) *Failure to act on violations of permits or other program requirements;*
 - (ii) *Failure to seek adequate enforcement penalties or to collect administrative fines when imposed;*
 - (iii) *Failure to inspect and monitor activities subject to regulation.*
- (4) *When the State program fails to comply with the terms of the Memorandum of Agreement required under §271.8.*

In determining whether cause exists to begin proceedings to withdraw the State's program, the Region first had to examine whether the allegations were the type covered by the above criteria. Only allegations that are grounded in the criteria established in §271.22(a) can form the basis for withdrawal of the State RCRA program.

For the allegations that met this first level of review, the Region next, after viewing the allegations in the light most favorable to the Petitioner,¹ determined whether the Petitioner clearly plead sufficient facts to warrant granting a hearing (i.e., established cause to begin proceedings to withdrawn the program.) Authorizing a hearing to withdraw any state's program is an extremely serious matter and should be done only where there are reliable facts and support for the allegations and those allegations clearly relate to one or more the criteria in §271.22(a).

While the EPA must ensure that each state is maintaining a program in accordance with the statute and regulations cited above, EPA also must be mindful of the significant impact on the states of having to respond to withdrawal petitions and defend its implementation of its authorized program in a possible hearing. Each such petition requires the relevant state agency to incur significant costs to defend its implementation of the program, costs both in terms of funds and staff time. These are resources that would be otherwise directed to developing and issuing permits or in pursuing and prosecuting violations of environmental standards.

Analysis of the Petition

Allegations Not Related Directly to the RCRA Program

After reviewing all the allegations, I determined that a number of them were not directly related to the RCRA program and, more specifically, were not grounded in any criteria identified in §271.22(a). These are the allegations numbered above as 5, 6, and 7. They relate to the management of nuclear material: inadequate compression of O-rings of nuclear waste shipping casks resulting in an imminent hazard (5), a cover-up by DOE

¹It appears from the Petition and exhibits that the Petitioner filed this as a pro se action. Given that fact, the Region made every attempt to construe the pleading liberally.

monitoring at WIPP (7). These allegations on their face are not directly related to the RCRA program and therefore cannot provide cause for initiating withdrawal proceedings.

These allegations relate to the nuclear activities occurring at WIPP. The waste to be disposed of at WIPP is defense related transuranic radioactive waste that also contains a RCRA regulated hazardous waste. Radioactive wastes that contain a hazardous waste component are termed a "mixed waste" by EPA.

RCRA § 1004(41) defines "mixed waste" as waste that contains both hazardous waste and "source, special nuclear, or by-product material subject to the Atomic Energy Act." In 1986, EPA published a Federal Register notice clarifying RCRA jurisdiction over the hazardous waste portion of mixed waste and required states to include mixed waste regulation in RCRA base program authorization. EPA stated that it only regulates the hazardous waste component of mixed waste. 51 FR 24504 (July 3, 1986). The Atomic Energy Act of 1954 (AEA), as amended applies to the radiological components of mixed waste. Under RCRA §1006(a), where RCRA and AEA requirements are inconsistent, AEA requirements prevail.

Thus, these three allegations relate to the nuclear component of the waste and therefore are not directly subject to the RCRA jurisdiction. The reporting and monitoring of radionuclides may be provided for incidental to the management of the hazardous waste component, but the direct management of radionuclides occurs pursuant to the AEA. In addition, there are no provisions in the authorization regulations that require a state to monitor or evaluate radionuclides or other material subject to the AEA. Therefore, these allegations do not establish cause to begin proceedings to withdraw the State's RCRA program.

Allegations Specific to the WIPP Permit

The next two allegations reviewed allege inadequate fire prevention controls underground at WIPP (8) and other unspecified safety deficiencies at WIPP (9).

In the exhibits submitted by Petitioner, the fire prevention issue is described as a violation of the Mine Safety and Health and Safety Regulations, not of RCRA, but even if one reads this allegation more liberally and infers that it might pertain to the RCRA program, it must still be determined whether or not Petitioner plead sufficient facts relating to this allegation to establish cause to proceed to a hearing. This allegation, even most liberally construed, might relate to 40 CFR §271.22(a)(2)(ii)-- repeated issuance of permits which do not conform to the requirements of this part. However, the fire prevention issue was described in exhibit six as the failure to have a fire extinguisher in a certain location, but there are no specific requirements in RCRA or its regulations for placement/location of fire extinguishers at RCRA sites. Petitioner neither alleges

any facts that demonstrate what provision of the RCRA regulations this violates nor pleads that this alleged defect is indicative of either a repeated issuance of permits which fail to conform to RCRA by the State of New Mexico or failure to conform to any other requirement of 40 CFR part 271, subpart A.

The next allegation of "unspecified serious safety violations" is merely a conclusory allegation. It contains no supporting facts which, even when read in the most liberal way, support a claim to commence withdrawal proceedings. On its face this allegation only relates to the WIPP permit and neither demonstrates a broader failure of repeated issuance of non-conforming permits by NMED nor presents any evidence suggesting that the New Mexico program does not comply with the requirements of 40 CFR part 271, subpart A.

The remaining allegations all deal with procedural matters raised during the WIPP permitting process. These allegations are that a State Hearing Officer made false representations as to Petitioner's testimony concerning the WIPP permit (1), that the State tried to "extort" money from the Petitioner by requesting that he pay for a copy of the permit appeal record (2), evidence tampering by the New Mexico State Appeals Court for excluding certain material/evidence the Petitioner sought to have included in the record (3) and criminal collusion and conspiracy between NMED, DOE and the State Appeals Court in excluding the evidence referenced in the evidence tampering charge (4). These allegations might conceivably be considered to relate to 40 CFR §271.22(a)(2)(ii)--- repeated issuance of permits which do not conform to the requirements of this part. All these allegations claimed irregularities in the specific permitting process conducted by NMED for the WIPP facility. After reviewing supporting exhibits filed by the Petitioner, I find that the allegations do not establish that the New Mexico program no longer complies with 40 CFR part 271, subpart A and there is no cause to commence withdrawal procedures.

Even though the Petitioner is proceeding *pro se* and the pleadings have been read broadly by the Region, he still must plead substantial, credible allegations supported by sufficient facts that could provide a basis for withdrawing NMED's authorized program in order to establish cause to proceed. He has not.

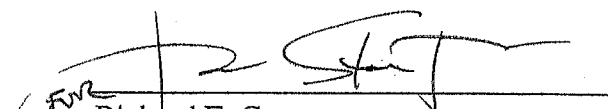
Even were irregularities peculiar to the WIPP permit sufficient to establish a basis for commencing proceedings to withdraw the entire State program-which they are not - these allegations are without factual foundation. At best, the information/facts plead by the Petitioner demonstrate that he received some adverse court rulings during the various stages of his WIPP permit appeal. There are no facts plead that support the Petitioner's conclusory allegations of false representation, evidence tampering, and criminal collusion or conspiracy to dismiss his appeal. As to the extortion allegation, there are no facts plead that support this position. The Petitioner's own version of the facts simply indicated a disagreement between him and opposing counsel over whether he was

entitled to an exemption from the cost of producing a copy of the record for Petitioner's state court appeal.

In sum, all of the above allegations relate to only one facility--the WIPP in New Mexico. None of the allegations state any facts showing the *repeated* issuance of RCRA permits by the State of New Mexico which do not conform to the requirements of the authorization rules. See 40 CFR §271.22(a)(2)(ii). While the WIPP hazardous waste permitting action generated a great deal of public interest and scrutiny, and the permit was challenged both in administrative actions and in civil actions, the RCRA state program withdrawal process was not established to provide an additional or alternate appellate process for a failed challenge to a single permit. Rather, the program withdrawal process is a remedy for widespread, systematic failure by authorized states to properly implement and enforce the overall RCRA program. Since the Petitioner only alleges concerns with the State's implementation of its authorized program based on a single permitting action by the State and has failed to trigger the "repeated" issuance criterion, as well as all the other 40 CFR §271.22 criteria, I cannot find that cause exists to commence withdrawal proceedings.²

²Even if concerns regarding a single permitting action could establish cause to proceed to a hearing, I do not believe the facts in the WIPP permitting action provide such a basis. Region 6's New Mexico and Federal Facilities Section and EPA Headquarters' Office of Radiation and Indoor Air did extensive reviews and oversight of the WIPP permitting action. Regional and Headquarters staff carefully reviewed the final Part B application and proposed permit for the WIPP and the State's actions in processing the permit. EPA's observations of the permit and NMED's actions were that the State permit writers properly considered the data provided in the WIPP permit application and proposed a permit with requirements consistent with State and Federal regulations. In addition, the State properly responded to significant comments made during the public comment period, including those raised during public meetings on the permit. Regional staff saw no indications of a failure to comply with permitting requirements and does not believe the WIPP permitting process provides any basis for cause to initiate withdrawal proceedings. EPA Headquarters also corresponded directly with Petitioner on some similar concerns prior to his filing this Petition. Headquarters determined that the Petitioner's concerns were either outside of EPA's jurisdiction or without merit. (See attached correspondence.)

For the above stated reasons, I have determined that the Petition before me does not provide cause to commence withdrawal proceedings, and I therefore deny the Petition.


Richard E. Greene
Regional Administrator
EPA Region 6

Dated: 6/3/03



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460



MAR - 9 1999

OFFICE OF
AIR AND RADIATION

Mr. Tod Rockefeller
319 Sunnyview Street
Carlsbad, NM 88220

Dear Mr. Rockefeller:

This is in response to your letter of February 15, 1999, to Administrator Carol M. Browner of the U.S. Environmental Protection Agency (EPA). Your letter alleges that EPA failed to respond adequately to the comments you submitted in January 1998 on our proposal to certify that the Waste Isolation Pilot Plant (WIPP) complies with our regulations for the disposal of transuranic radioactive waste (40 CFR Part 191). Your letter also alleges that EPA incorrectly approved the WIPP's quality assurance program. In support of these allegations, you resubmitted some of the materials from your original comments, as well as the following additional materials: (1) a memorandum from you to E. Kent Hunter dated July 14, 1997; (2) a press release from the Government Accountability Project dated May 30, 1997; and (3) a memorandum from you to Lindsay Lovejoy, Assistant Attorney General of New Mexico.

The documents that you submitted in January 1998 were filed as IV-F-10 in the EPA Air Docket A-93-02. I assure you that my staff thoroughly reviewed your comments. Our review led to the conclusion that your comments did not clearly and directly relate to the decision for which EPA had requested public comments, namely, the compliance of the WIPP with the disposal regulations at 40 CFR Part 191. Some of the materials you submitted dealt with your professional qualifications, while others dealt with a complaint you had against the U.S. Department of Energy (DOE) as your former employer.

The remaining materials addressed two issues. First, you disputed the DOE Carlsbad Area Office's handling of quality assurance for bolting material for radioactive waste shipping casks. Second, you questioned the adequacy of the environmental monitoring plan for the WIPP. EPA identified and responded to both of these issues in our Response to Comments Document (Air Docket A-93-02, Item V-C-1, comment 736 on page 1-33 and comment 737 on page 11-1). In the first instance, we responded that EPA is not the regulatory authority for the transportation of radioactive waste, including shipping containers. The elements of the WIPP program for which EPA applied quality assurance requirements are specified in our compliance criteria for the WIPP at 40 CFR 194.22(a)(2)(i) to (viii). Transportation of radioactive waste is not included in this list. In the second instance, we responded that the environmental monitoring plan was not required by the compliance criteria because the monitoring addressed in that report does not relate to the ability of the WIPP to contain transuranic waste. The relevant monitoring was addressed in other



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parts of the compliance application for the WIPP, which we reviewed and found adequate (63 FR 27395).

EPA evaluated the adequacy of the WIPP's quality assurance program through the appropriate means, specifically, independent audits and inspections. Based on these activities, we found that the operators of the WIPP properly established and executed the quality assurance requirements specified of 40 CFR 194.22(a)(1) for the activities at 40 CFR 194.22(a)(2). The basis for EPA's proposal to approve the WIPP's quality assurance for these activities was published in the Federal Register on October 30, 1997, (62 FR 58792-58838). The documents you subsequently submitted did not respond directly to any of the statements made by EPA in either the proposed rule or the quality assurance reports that EPA produced in support of the proposed rule.

Similarly, the new materials you sent with your letter of February 15 do not contain any information that would cause EPA to question our final certification decision. You state that one item, a DOE memorandum dated July 14, 1997, is evidence that "the WIPP contractor's Quality Assurance program does not work." However, the memorandum contains only your disagreement with the WIPP contractor's (Westinghouse) responses to comments from the New Mexico Environment Department. This document does not provide information which changes EPA's conclusion that Westinghouse's quality assurance program for the WIPP is adequate.

The second new item, from the Government Accountability Project, concerns the release and reinstatement of a DOE employee named James Bailey and does not appear to have any relation to the WIPP's compliance with EPA's disposal regulations for transuranic waste. The last item, your letter to Mr. Lovejoy, alleges that EPA violated the False Statements Accountability Act of 1996 (Pub. L. 104-292) and that EPA did not respond appropriately to your January 1998 comments. At no time during the certification rulemaking did EPA attempt to falsify, conceal, or cover up material facts. Your comments were and are available for public review in Washington, D.C., and in supplementary dockets in Carlsbad, Albuquerque, and Santa Fe, New Mexico. The document in which we responded to your comments is also available in those dockets. As I explained above, EPA's responses to your comments were sufficient given the limited extent of their applicability to EPA's certification of the WIPP.

Sincerely,


Lawrence G. Weinstock, Director
Radiation Protection Division



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 13 1999

OFFICE OF
AIR AND RADIATION

Tod Rockefeller
319 Sunnyview Street
Carlsbad, NM 88220

Dear Mr. Rockefeller:

Thank you for your letter of March 23, 1999, to Administrator Carol M. Browner of the U.S. Environmental Protection Agency (EPA). We appreciate that you are concerned that the U.S. Department of Energy (DOE) be in compliance with EPA's requirements for the Waste Isolation Pilot Plant (WIPP). However, we have already responded to the specific issues you initially raised in your January 1998 comments on EPA's proposed certification of the WIPP, and subsequently in your letter of February 15 to Administrator Browner. Briefly stated, we determined that these issues do not directly and clearly relate to our decision to certify the WIPP and do not lead us to reconsider that decision. We have at no time attempted to trivialize, cover up, or otherwise fail to address properly DOE's compliance with our regulations for quality assurance. Our position in this matter has not changed since our last correspondence.

Sincerely,



Stephen D. Page, Director

Office of Radiation and Indoor Air



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 20 1999

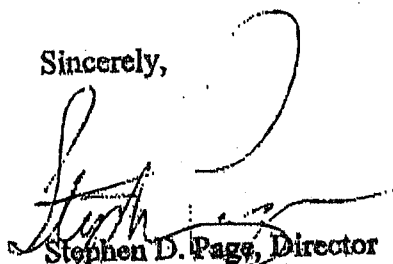
OFFICE OF
AIR AND RADIATION

Tod Rockefeller
319 Sunnyview Street
Carlsbad, NM 88220

Dear Mr. Rockefeller:

This is in response to your most recent letter to Administrator Carol Browner of the U.S. Environmental Protection Agency (EPA) dated April 27, 1999. After careful review, we disagree with your conclusion that the Waste Isolation Pilot Plant (WIPP) is unsafe and should not have been approved for the disposal of transuranic waste. The evidence you include in Exhibit P-C-1 to support your allegation of misconduct consists of material that EPA explicitly addressed in our previous correspondence to you (March 9 and April 13). Our position on these items has not changed. In addition, please be advised that EPA's regulatory authority for administering the hazardous waste disposal permit for the WIPP has been delegated to the State of New Mexico. Any concerns you have with this permit should be addressed to the New Mexico Environment Department.

Sincerely,


Stephen D. Page, Director
Office of Radiation and Indoor Air

WIPP CTR (6602J):SDMonroe/ves/5-17-99:(202) 564-9310:crtodrock3
Control No: AX-9903587

Due: 3/18/99